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SUPREME COURT, U.S.

No. 933

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

HENDERSON CLAY PRODUCTS, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Fort Worth Brief Printing Co., 610 S. Jennings Street Phone ED 2-4079

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Henderson Clay Products respectfully requests that this Supplement be considered in connection with its petition for a writ of certiorari heretofore filed in this Court on March 18, 1964.

QUESTIONS PRESENTED

Whether the holding of the Court of Appeals conflicts with the later case of *United States v. Longhorn Portland Cement Company*, ___ F. 2d ___, Fifth Circuit March 2, 1964.

REASONS FOR GRANTING THE WRIT

The holding of the Court of Appeals in this case (that the proportionate profits method of determining "gross income from the property" must be used) di-

rectly conflicts with its later case of *United States v. Longhorn Portland Cement Company*, decided March 2, 1964, in which the Internal Revenue Service initially allowed the integrated miner of cement rock manufacturer of cement a depletion allowance computed by the proportionate profits method; the integrated miner manufacturer paid the tax, filed claim for refund, and the District Court, holding that no market existed for the mineral except in the cement form, adopted the taxpayer's view that *Cannelton* did not apply, and that the gross income from the property was the sales price of the first marketable product—cement. The Court of Appeals for the Fifth Circuit reversed and remanded the case, holding that the appropriate basis for the depletion allowance was the constructive income from the cement rock, rather than the income from cement or income determined pursuant to the proportionate profits method, and in so doing, stated:

> "As pointed out by the Supreme Court in Monolith, two significant holdings made in Cannelton are: (1) that Congress intended to grant miners a depletion allowance based on constructive income from the raw mineral produced, if marketable in that form, and not on the value of the finished product, and (2) that the statutory percentage depletion allowance on the gross income of an integrated miner-manufacturer should be cut off at the point *where the mineral first became suitable for industrial use or consumption*. The latter is a holding to the effect that at the point where a mineral first becomes suitable for industrial use or consumption, a 'com-

mercially marketable mineral product' has been obtained.

"Longhorn's cement rock at the crushed stage, beyond question, was highly acceptable for industrial use or consumption, namely, for use in the manufacture of cement—the use that Longhorn and all other miners of cement rock in the United States made of crushed cement rock. Furthermore, there is no question but that Longhorn's cement rock was marketable in crushed form. As above pointed out, the undisputed evidence shows that large amounts of limestone, other than limestone of the cement rock variety, were sold annually in the United States to be used as the principal ingredient in the manufacture of cement. The fact that neither Longhorn nor any of the other miners of cement rock, each of whom used all of of the cement rock it mined to manufacture cement as did Longhorn, sold to any other person its cement rock in crushed form or in any other form is immaterial to the question of marketability of cement rock in crushed form because, under the teachings of Cannelton, Longhorn is to be treated as though it sold its cement rock to itself for processing into cement. Longhorn was the market for its mineral.

"Applying Cannelton and Monolith to the undisputed facts in this case, we find and conclude the the 'commercially marketable mineral product' first obtained by Longhorn from its cement rock was such cement rock at the crushed stage, and that Longhorn's basis for its depletion allowance should have been limited to its constructive income from its cement rock at the crushed stage rather than from finished cement." [Italics in original]

The case was remanded for disposition in accordance with the opinion—i. e., to determine the constructive income from crushed cement rock.

Thus, for the second time, the Court of Appeals has held directly contrary to its holding in the present case—which holding is that even though a market exists for the raw mineral, the proportionate profits method of determining the gross income for the property must be used, rather than the market price of the raw mineral.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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